

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAKE C. LEWIS**

Claimant

VS.

**SUN GRAPHICS, INC.**

Respondent

AND

**ACCIDENT FUND INS. CO. OF AMERICA**

Insurance Carrier

Docket No. 1,031,707

**ORDER**

Respondent and its insurance carrier request review of the December 18, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

The Administrative Law Judge (ALJ) found the claimant provided timely notice and therefore ordered respondent to pay temporary total disability benefits and authorized Dr. Munhall as the treating physician.

The respondent requests review of whether the claimant gave timely notice.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a press man for respondent, but on September 14, 2006, the claimant and a co-worker were collating calendars. The claimant alleged that as he was twisting to the left to put a stack of calendars on a skid he experienced a burning sensation across his lower back. About 30 to 40 minutes later, the claimant began to have severe pain down into his right leg. At that point he left work early and went home.

Claimant testified that at that time there was nobody in a supervisory capacity to tell about his back and leg problems.

The next day, September 15, 2006, the claimant went to pick up his paycheck and testified that he also had a conversation with Jim Blackburn, respondent's controller, about his injury. Claimant testified that he told Mr. Blackburn that he had gone home early the previous day because he had hurt his back. Claimant expressed the hope that his back would improve and he would be able to work the following Monday, September 18, 2006. Claimant did not ask Mr. Blackburn to fill out a workers compensation accident form because he thought he would be able to return to work on Monday. Mr. Blackburn denied he had any conversation with claimant on September 15, 2006.

By Monday, September 18, 2006, claimant's back condition had not changed and he called his supervisor, David Martin, to tell him that he would not be in to work that day. Claimant testified that he told Mr. Martin that he had left work early on September 14, 2006, because he had hurt his back while collating and had gone home early. But he did not request that a workers compensation form be filled out because he thought his back would improve and he would be able to return to his normal job duties. Mr. Martin recalled the conversation but denied that claimant explained why his back was hurting or that he had hurt it at work.

Claimant then went to the chiropractor twice on Monday and once on Tuesday and then went in to his job on the second shift and worked September 19, 2006. Claimant's back pain persisted so he went to see his personal physician on September 20, 2006. The doctor scheduled claimant for an MRI and x-rays the following week. The claimant then went and talked to Mr. Martin about the proposed tests and told Mr. Martin that he could not work because of his back pain.

On October 2, 2006, claimant had the first of several meetings with Mr. Blackburn. On that date, the claimant was again picking up his paycheck and Mr. Blackburn observed that claimant had back pain and was told by the claimant that he had a pinched nerve in his back. But claimant never requested that a workers compensation claim be filed and Mr. Blackburn testified that he was unaware claimant was alleging he injured his back at work. On October 5, 2006, claimant called Mr. Blackburn and requested forms to apply for FMLA. Mr. Blackburn sent claimant the forms as well as forms for short-term disability. On October 12, 2006, the claimant met with Mr. Blackburn and returned the necessary forms to take a loan on his 401(k). At that meeting the claimant made the comment that he should have filed this as a workers compensation claim but Mr. Blackburn thought claimant was kidding him. Mr. Blackburn first became aware claimant was alleging a workers compensation claim when he received the a letter from claimant's attorney on October 17, 2006.

On October 2, 2006, the claimant was examined and evaluated by Dr. Meister, an orthopedist. The doctor recommended steroid injections and the claimant received the first

injection on October 4, 2006. Dr. Meister placed restrictions on the claimant of no lifting greater than 20 pounds; no pushing or pulling over 20 pounds; no prolonged standing or walking, and should be sitting 30 percent of the time. Claimant testified the respondent was not able to accommodate these restrictions and he has not worked since September 19, 2006. Although claimant saw three different doctors he did not provide any of them with a history of being hurt at work.

On October 5, 2006, claimant requested forms from respondent to apply for FMLA benefits. He further requested a loan from his 401(k) account. Claimant had previously filed a workers compensation claim against respondent. Nonetheless, he explained that he sought the FMLA benefits and a loan instead of requesting workers compensation benefits because of the stigma at respondent against filing a workers compensation claim. Claimant testified:

Q. Why did you take a loan against your 401(k) rather than request the company pay you workers compensation benefits?

A. Well, I don't know. At that time, bills were already coming in and everything, and I make -- I'm the only person that makes a decent income in my family and everything, and we did have a little bit in savings and stuff, but not enough to go a long-term period of time with it; and so -- so I took that out to have in the bank so that if I needed to be paying out of pocket for insurance, which was going to be \$2200 or \$2,000, I guess, from our part and everything, that I would have money to take care of my bills.

Q. I guess my question is, why didn't you talk to somebody at Sun Graphics about getting workers compensation benefits rather than pull money out of your 401 (k) and file for FMLA?

A. I guess the reason I didn't is because it seems like around that place whenever you talk about workmen's comp, it's just a real dirty issue actually.

Q. You had filed workers compensation benefits before and knew they were available through Sun Graphics, didn't you?

A. Right.

Q. You had received those benefits?

A. Right.<sup>1</sup>

Claimant sought legal counsel on October 16, 2006 and requested workers compensation benefits from respondent. Respondent received the letter the following day.

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<sup>1</sup> P.H. Trans. at 45-46.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520 obligates an employee to notify the employer within ten days after the date of accident regarding the time and place and particulars of the accident. Claimant contends he advised respondent's representatives of his accidental injury. However, Mr. Blackburn and Mr. Martin both deny claimant's allegations that he advised them of the work-related injury. The claimant agreed that he never requested medical treatment nor requested that an accident report be prepared in his meetings with Mr. Blackburn and Mr. Martin. Moreover, the claimant requested FMLA as well as a loan against his 401(k) account rather than requesting workers compensation benefits even though he had previously filed a workers compensation claim against respondent and was aware benefits were available for work-related injuries. And claimant agreed that he never told the three doctors that he had injured his back at work.

In this instance the claimant's complaints of pain did not constitute notice of an injury. It seems clear that in context the claimant's complaints were not understood as complaints that the work was causing the symptoms. Mr. Blackburn and Mr. Martin both testified that claimant never stated his back pain was connected with nor caused by his work.

This Board Member finds claimant has failed to meet his burden of proof that he provided notice in a timely fashion as is required by K.S.A. 44-520. Therefore, the Order of Administrative Law Thomas Klein dated December 18, 2006, should be reversed as claimant failed to prove that he provided notice to respondent of an accidental injury within ten days as required by K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>3</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated December 18, 2006, should be, and is hereby, reversed and claimant is denied benefits.

**IT IS SO ORDERED.**

Dated this 28th day of February 2007.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>2</sup> K.S.A. 44-534a.

<sup>3</sup> K.S.A. 2005 Supp. 44-555c(k).